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A Perfect Storm – The Negative Effects of Felony Voting Laws and the Repeal of Section 4 of the Voting Rights Act on Minority Americans

A PERFECT STORM — THE NEGATIVE EFFECTS OF FELONY VOTING LAWS AND THE REPEAL OF SECTION 4 OF THE VOTING RIGHTS ACT ON MINORITY AMERICANS.

By: Genevieve Saul¹

I. Introduction

The right to vote is the keystone of democratic participation. Alexander Hamilton viewed this right as “a share in the sovereignty of the state, which is exercised by the citizens at large... one of the most important rights of the subject.”² Despite the integral nature of voting in our system, the history of voting rights in the United States is contentious, exclusionary, and riddled with years of systematic discrimination.³ It is also complex. With the exception of the prohibitions against race or gender-based voting discrimination that were enacted by the Fifteenth and Nineteenth Amendments⁴ to the United States Constitution following the Civil War, the practical administration of the voting process and the necessary qualifications for voter eligibility were never outlined in the Constitution and were left entirely to the states.

The flexibility granted to the states to create their own framework for voting regulations allowed for the creation of exclusionary practices, which were largely designed to keep minority groups from voting.⁵ Throughout the country, particularly in the Reconstruction Era South, these practices were overt, running the gambit from outright intimidation to literacy tests and poll taxes.⁶ Two types of practices had a particularly far-reaching impact: the disenfranchisement that resulted from the mass incarceration of minorities, and the denial of voting rights through discriminatory laws and regulations that unequally impacted minorities.⁷ In the last century, the comprehensive and discriminatory effects of these practices were addressed in a meaningful way, culminating in the passage of landmark legislation, the Voting Rights Act of 1965 (“VRA”).⁸

The VRA was passed specifically to combat the pervasive and corrosive effects of racial discrimination

through the disenfranchisement of minorities, “an insidious and pervasive evil that has been perpetrated in certain parts of our country through unremitting and ingenious defiance of the Constitution.”⁹ This effort achieved considerable success, and the VRA was one of the most widely renowned pieces of legislation ever drafted.¹⁰ Although the problems associated with unequal access to the vote were far from cured and minorities were still significantly underrepresented at the polls, the VRA was a meaningful step toward equality of franchise rights, and the passage and implementation of the VRA represents a high water mark in the fight for an opportunity for all American citizens to the right to the franchise.

Despite the notable advances in civil rights advances in the 20th century, recent developments indicate that much of the progress made to ensure minority-voting rights might be short lived. Although the factors that limit minority voting are not as overt as they once were, they are still a present, and potent, force.¹¹ This article will outline some of the enduring factors that continue to repress minority voting. Part II will summarize the history of felony disenfranchisement in the United States. Part III will address the enduring specter of wide-reaching and extremely punitive felon disenfranchisement laws throughout the country, their correlation with race, and the other potential impediments that felons face to regaining their voting rights. Part IV will discuss the implications of the recent repeal of Section 4 of the VRA in *Shelby County, Ala. v. Holder*, and the potential effects this repeal may have. All told, these factors represent a disturbing trend away from the civil rights advances of the last century and toward denying a greater percentage of the minority population their voting rights.¹²

II. Incarceration as a Ban on Voting Rights

A. Introduction

The United States has a peculiar love affair with jailing its own citizens. America imprisons more of its own populace than any other industrialized nation in the world.¹³ There is every indication that this trend of mass incarceration will be an enduring problem in the United States, as the overall percentage of the population that is in prison is growing at an alarming rate.¹⁴ More minorities are imprisoned than Caucasians overall, and African Americans are imprisoned in proportionally higher numbers than any other racial or ethnic group.¹⁵ These elements, combined with the fact that the vast majority of states retain some form of felon disenfranchisement, illustrate that at any given time a significant percentage of the minority population in our country is without the right to vote. Additionally, although some states indicate that the disenfranchisement of felons is only meant to be temporary, numerous factors can bar an inmate's ability to regain his or her right to vote even if it is legally permissible. All together, these elements lead to a significant percentage of the population that is entirely without a voice in our electoral system.

B. History of Felony Disenfranchisement in the US

Although denying voting rights to those individuals who were convicted of crimes is a practice that can be traced as far back as ancient Greece, it has a particularly long and thorny history in the United States. The concept of felon disenfranchisement took hold in medieval Europe and was present in America from its inception, appearing as early as the 1600's in the Colonies.¹⁶ Although the majority of states had laws denying the right to vote to individuals convicted of crimes prior to passage of the Thirteenth, Fourteenth, and Fifteenth Amendments; the application of felon disenfranchisement laws took on a different tenor following their enactment.¹⁷ For states that had been members of the Confederacy, readmission to the union was contingent upon several factors, including complete adherence to the U.S. Constitution through the ratification of the Fifteenth Amendment and the assurance that state laws conformed to federal guidelines.¹⁸ Accordingly,

through the adoption of the Fifteenth Amendment, the states explicitly extended the vote to all African American men.¹⁹

The South, however, was not particularly interested in complying with the spirit of the Reconstruction amendments. Many obstacles were placed in the paths of African American voters:

[D]espite the lofty goals of the Reconstruction era, Jim Crow came to dominate the South as Reconstruction ended, and blacks were socially and politically excluded from full participation in the life of the nation.²⁰ Their rights were systematically denied through the use of poll taxes, grandfather clauses, property tests, as well as literacy tests and intimidation.²¹

Felony disenfranchisement was a key factor in the arsenal of weapons designed to discourage the minority vote.²² In some states, such as South Carolina and Mississippi, only those crimes viewed as "black crimes" received a loss of voting rights in addition to jail time, such as thievery, arson, rape, and wife beating.²³ By 1910, five Southern states had enacted felony disenfranchisement laws that were in actuality geared toward denying African Americans the right to vote.²⁴

Despite the obviously prejudicial and unequal application of felony disenfranchisement laws, these laws were difficult to challenge on a constitutional level. The Thirteenth Amendment explicitly permitted involuntary servitude when an individual was convicted of a crime, and states continued to enact legislation regarding the punishment of its citizens as each state saw fit.²⁵ Additionally, the United States Supreme Court did little to enforce the legislative intention of the Reconstruction amendments. In the *Slaughter-House Cases*²⁶, the Supreme Court took a narrow view of the Fourteenth Amendment, refusing to apply the relevant protections of the Immunities Clause to the states. This narrow interpretation of the amendment effectively created separate federal and state levels of citizenship and fundamentally eviscerated the intent of the Fourteenth Amendment's Due Process and Equal Protection clauses by providing the states with

the ability to avoid federal oversight regarding the application of the amendment.²⁷

With time, however, the Supreme Court shifted its perspective. Although the *Slaughter-House Cases* were never explicitly overturned, the Court's interpretation of the Equal Protection and Due Process Clauses was expanded to provide the Federal Government with more oversight and control over state actions, which allowed for the intended application of the Fourteenth Amendment and for the civil rights advances of the 20th century.²⁸ Important strides were also made regarding the constitutionality of felon disenfranchisement laws. In *Hunter v. Underwood*, the Supreme Court held that felon disenfranchisement laws could not be applied for impermissible motives, or where "racial discrimination is shown to be a substantial or motivating factor behind the enactment of the law."²⁹ In litigation of these cases, the burden of proof shifted from the plaintiff to the proponents of the law. The states would now have to prove that that law in question was enacted without prejudicial intent.³⁰ Furthermore, those statutes denying voting rights to felons that had been enacted with discriminatory intent were determined to be unconstitutional when they remain "tainted" by this original objective, although the Court implied that the laws could be rewritten to remove the prejudicial effect.³¹ Despite these advances, the use of felony incarceration had become deeply engrained in the American system, and was still effectively used to completely or temporarily deprive minorities of the vote.

III. Modern Felony Incarceration in the United States

A. *The Correlation between Race, Socio-Economic Status, and Mass Incarceration*

Although the targeted application of felon disenfranchisement laws in an overtly prejudicial manner is unconstitutional, the right of states to deny the vote to individuals convicted of felonies remains entirely constitutional.³² The Court in *Richardson v. Ramirez* affirmatively upheld the constitutionality of facially-neutral felon disenfranchisement laws.³³ *Richardson* also provided the standard by which laws denying votes following convictions are scrutinized:

Courts closely analyze the constitutionality of state restrictions on the right to vote under fundamental rights jurisprudence. Since voting has been deemed a fundamental right, states must show that restrictions on voting are necessary pursuant to a compelling government interest, are narrowly tailored, and are the least restrictive means of achieving a state's objective. However, felon disenfranchisement laws have been exempted from the standard fundamental/equal rights protection analysis since the Supreme Court's decision in *Richardson v. Ramirez*.³⁴

As a result of *Richardson*, strict scrutiny is not applied to felony disenfranchisement laws and courts typically do not analyze whether the laws have a discriminatory effect, but simply whether the law was passed with a discriminatory intent.³⁵

Even if the intent of felony disenfranchisement laws is not prejudicial, the impact of the laws disproportionately affects minorities.³⁶ With 2.2 million of its citizens currently incarcerated, the United States jails more of its population than any other nation in the world.³⁷ The majority of these incarcerated individuals are African American, and current estimates indicate that one in three black men will be imprisoned at some time in his life.³⁸ Given these statistics, the loss of voting rights for minority felons, especially African Americans, is substantial.

Although the variety of factors that led to the disparate rates of incarceration amongst different races is manifold, the correlation between imprisonment and poverty is one of the most well documented factors.³⁹ Studies indicate that in many of the nation's urban areas, "the exit and reentry of inmates is geographically concentrated in the poorest minority neighborhoods."⁴⁰ Race, class, and poverty all play central roles in the equation of who is likely to be incarcerated.⁴¹ Although statistical data regarding the economic status of prisoners is spotty, more than eighty percent of prisoners meet the qualifications for legal services for indigent persons, indicating that there is a direct correlation, if not causation, between poverty and crime.⁴² Incarceration and poverty are inexorably linked.

Additional evidence indicates the prevalence of crime and incarceration in geographically concentrated areas begets higher rates of incarceration overall: “[E]vidence [is found] that at some tipping point, incarceration remains stable or continues to increase even as crime — the supply of individuals for incarceration — remains constant or declines.”⁴³ [I]ncarceration’s special concentration induces more incarceration.⁴⁴ If geographic areas are found in states that practice felony disenfranchisement, the practical implication is that entire geographic area, arguably containing those individuals who are most in need of the ability to influence change, are left without appropriate representation in their government.

In fact, the vast majority of states practice some form of felony disenfranchisement.⁴⁵ Although not all states have the same regulations, forty-eight states suspend voting rights for a period of time following a felony conviction.⁴⁶ As of 2013, four states had an outright ban on reinstatement of voting rights following any felony convictions.⁴⁷ Only two states permit citizens to vote regardless of criminal convictions.⁴⁸ Several states permit permanent bans on the reinstatement of voting rights following limited felony convictions, and nineteen states permit reinstatement of voting rights only following prison, parole, and probation.⁴⁹ Fourteen states permit felons to vote as soon as they are released from prison, and the remaining grouping of states have individualized requirements for when felons can regain the right.⁵⁰ Although there is significant variation in voting limitations for felons in the states, the cumulative effect of these laws lead to minority felons being entirely banned from voting or being compelled to wait years and/or satisfy a multitude of requirements before they are able to regain their franchise rights.⁵¹

B. Obstacles to Regaining Suffrage—Carceral Debt as an Impediment to Regaining the Vote

Although eighteen states explicitly provide felons the ability to regain their right to the franchise following their successful completion of parole and probation, this process is far from easily accomplished.⁵² Debts frequently accrue in conjunction with the crime that the individual was incarcerated for, or accumulate as a result of the prisoner’s absence from society.⁵³ Courts commonly impose fines as part of the criminal sentencing process,

prisoners may owe victims or their families’ monetary restitution, and prisoners can accumulate personal debts such as overdue child support payments while incarcerated.⁵⁴

These debts can create a nearly insurmountable obstacle to regaining voting rights.⁵⁵ Frequently, a felon’s probationary or parole period is not concluded until all debts are repaid, and these debts need not be based on the crime for which the felon was imprisoned.⁵⁶ If an individual is in dire financial straights when they are released from prison, they may potentially default on debts that they are unable to pay, rendering themselves unable to qualify to be released from parole or court supervision.⁵⁷ Further compounding the problems related the repayment of debts, former prisoners have a difficult time re-entering the workforce following a conviction.⁵⁸

Remarkably, debts that are entirely unrelated to the felon’s conviction can also bar the regaining of voting rights. Child support arrears have a particularly crippling effect.⁵⁹ In some cases felons are permitted to suspend their child support duties for the period that they are incarcerated, but if not, they are faced with a child support debt that has potentially accumulated for the entirety of their incarceration, and must be repaid before their voting rights can be regained.⁶⁰ Additionally, if the failure to pay these debts continues for long enough, a former felon can face contempt charges, leading to additional jail time.⁶¹ Prisoners also frequently face debts from their lives prior to incarceration that continued to accrue during their time in prison.⁶²

The idea of barring the right to vote as a result of criminalized debt is particularly alarming as it is limited to former felons and has the notable effect of continued disenfranchisement.⁶³ In no other context does unpaid debt prevent an individual from exercising their voting rights.⁶⁴ In fact, the right to vote is viewed to be an essential right of citizenship in nearly every other context.

The right to vote is fundamental for non-felons, requiring strict scrutiny analysis of state laws that infringe on that right. Simultaneously, courts allow a deferential rational basis analysis for would-be voters with felony convictions, framed as the regulatory *restoration* of voting

rights. Such an approach amounts to an analytical trick, which shields courts from a more exacting inquiry into the rationality of the laws that separate felons from their important exercise of voting rights. Despite the historical antecedents for doing so, these divergent approaches run counter to the modern notion of expanding democracy. They also legalize discrimination.⁶⁵

While the government undoubtedly has a substantial interest in recovering these debts, the questions of indebtedness and voting rights are two distinct issues and should be treated as such. The bar of voting rights through carceral debt can easily be seen as a back-door method to continue to disenfranchise individuals who have repaid their debt to society. Given the importance of voting in maintain our democracy, full citizenship rights should be regained concurrently with release from prison. Voting rights should not be impeded by unrelated debts.

While the effects of felony disenfranchisement on our society are alarming enough at the current rate of incarceration, the nearly exponential growth of the prison population is an additional cause for serious concern. The problem of felony disenfranchisement will likely only be compounded with time: the prison population is seven times larger today than it was in 1970.⁶⁶ If substantial steps are not taken to change the current state of felony disenfranchisement law, ever increasing numbers of Americans will be systematically denied the right to vote, perhaps permanently.

C. Calls for Change

The reality of the vast numbers of Americans who have paid their debt to society but are still not permitted to exercise the right to vote is sobering. American perspectives on felony disenfranchisement are particularly draconian when compared to other nations.⁶⁷ Only eight other countries in the world restrict voting both during incarceration and after a prison sentence has been served.⁶⁸

However, there is some indication that American perspectives on felony disenfranchisement are shifting. Notable public figures have increasingly called for allowing ex-felons to regain their voting rights. Senator Rand Paul has spoken on numerous

occasions regarding his desire to provide felons with state and federal voting rights as soon as they have served their time in prison.⁶⁹ Similarly, former Virginia Governor Bob McDonnell has restored the voting rights of close to 5,000 'non-violent' felons in Virginia, more than any governor in the nation, and made efforts accelerate the rate at which voting rights could be restored in Virginia.⁷⁰ Most recently, Attorney General Eric Holder outlined President Obama's vision on the issue, calling upon the states to end felon disenfranchisement, and describing the practice as "unworthy of the greatest justice system the world has ever known."⁷¹ Although Holder's words have no legal effect and no impact on the Constitution, the President's focus on this issue is noteworthy.⁷² Although such calls for change are promising, the fact remains that the United States incarcerates more of its population than any industrialized nation in the world, an increasing number of those incarcerated are minorities, and most states practice some form of felony disenfranchisement.⁷³ Until significant changes are made, the United States is denying many of its citizens, largely minority citizens, the right to vote.

IV. The Impact of the VRA and the Interaction of the VRA and Felony Disenfranchisement

A. Application of the VRA

The Voting Rights Act was one of the most noteworthy pieces of civil rights legislation in American history.⁷⁴ In the years following the ratification of the Fifteenth Amendment, numerous tactics, such as grandfather clauses, poll taxes, redistricting practices, and literacy tests, had sprung up as methods to prevent African Americans from exercising their voting rights, particularly in states that were formerly part of the Confederacy.⁷⁵ These tactics were remarkably efficacious until they were directly addressed and curbed by the VRA.⁷⁶ Although the implementation of the VRA was met with vehement opposition when first implemented, its constitutionality has been verified in numerous Supreme Court decisions.⁷⁷ Additionally, all provisions of the VRA, both permanent and temporary, were renewed and extended every time Congress voted upon them.⁷⁸ The VRA presented a meaningful and effective remedy to discriminatory voting practices,

and the landmark importance of the law was widely acknowledged.⁷⁹

Much of the force behind the VRA could be found in Sections 2 and 4 of the Act. Section 2 focused on equal access to voting from its inception and was modified in 1983 to include a component ensuring electoral practices did not create racially discriminatory results.⁸⁰ A test was created under Section 2 requiring that:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color⁸¹

At least 331 lawsuits have been filed under Section 2 since 1983 and plaintiffs succeeded in these suits approximately 37.8 percent of the time.⁸²

Section 4 of the VRA addressed a different aspect of discriminatory voting practices.⁸³ Namely, section 4 provided a formula for determining if jurisdictions restricted the minority vote in impermissible ways.⁸⁴ Under this formula, the use of “tests or devices” such as literacy tests or tests of moral character as a threshold requirement for voting were prohibited.⁸⁵ The formula also examined the percentages of voting age adults who were registered to vote in a given jurisdiction—if the number of registered voters in a jurisdiction was less than 50 percent of the technically eligible population for the Presidential election, this was deemed an impermissible repression of minority voters.⁸⁶

Using this formula, those jurisdictions that were found to have impermissibly repressed the rights of minority voters were said to be “covered” and were accordingly subject to a close decree of federal scrutiny in the administration of their voting practices.⁸⁷ This federal scrutiny was detailed in Section 5 of the VRA. Under Section 5, covered jurisdictions cannot make any changes to their voting practices unless they are reviewed and approved by the U.S. Attorney General or the U.S. Court of Appeals of the District of Columbia.⁸⁸ Effectively, those jurisdictions that had previously engaged in discriminatory practices against minority voters were under constant federal

supervision unless they could present evidence of ten years of nondiscriminatory practices and receive a “bailout” from federal coverage.⁸⁹ In the time period in which Section 4 was in effect, fifty-one jurisdictions had augmented their voting practices sufficiently to receive a bailout.⁹⁰

Interestingly, these suits took place with only slightly less frequency in jurisdictions that were impacted by Section 5 of the VRA than those that were not (46.4 percent of suits filed in covered jurisdictions versus 53.5 percent in non-covered jurisdictions).⁹¹ The breakdown of which lawsuits were filed in covered and non-covered jurisdictions is notable because those districts that were covered by Section 5 of the VRA were jurisdictions designated by the Department of Justice as having reputations of discriminatory voting practices.⁹² Given that discriminatory voting practices potentially occurred with even greater frequency in those jurisdictions that did not have a marked history of discrimination against minorities as determined by the Department of Justice when compared to those that did, the marked importance of the VRA is evident.

Until June of 2013, the VRA effectively supplied victims of racially or ethnically based discriminatory voting practices two different methods to combat the discrimination under Section 2 and Section 4.⁹³ However, the Supreme Court’s recent decision in *Shelby County, Alabama v. Holder* in June 2013 has changed the analysis completely.

B. *The Effects of Shelby County, Alabama v. Holder*

In a 5-4 decision, the Roberts Court found Section 4 of the VRA to be unconstitutional.⁹⁴ The Court reasoned that the formula used to calculate which jurisdictions should be “covered” was outdated and based upon concerns about racism that were rooted in a different and more inequitable time in American history: “[O]ur country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to the current conditions.”⁹⁵ Although the Court did not reach any conclusions regarding Section 5 of the VRA, the repeal of Section 4 effectively stripped Section 5 of its power in that it is impossible to determine what whether jurisdictions are implementing voting

regulations in a discriminatory manner if there is no formula by which to determine what constitutes discrimination.⁹⁶

In a strongly worded dissent, Justice Ginsburg made her opinion on the implications of this decision clear, intimating that this decision crippled the intention of VRA, a law that still has crucial importance: “[A]lthough the VRA wrought dramatic changes in the realization of minority voting rights, the Act, to date, surely has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens.”⁹⁷ Ginsburg addressed new “second generation” barriers to minority voting, indicating that the VRA was crucial to combating these discriminatory practices as well.

Second-generation barriers come in various forms. One of the blockages is racial gerrymandering, the redrawing of legislative districts in an ‘effort to segregate the races for purposes of voting.’ Another is the adoption of a system of at-large voting in lieu of district-by-district voting in a city with a sizable black minority... whatever the device employed, this court has long recognized that vote dilution, when adopted for a discriminatory purpose, cuts down the right to vote as certainly as denial of access to the ballot.⁹⁸

Additionally, Justice Ginsburg pointed to Congress’s considered analysis of the VRA and its effects when the legislation was reviewed in 2006, and concluded that they had reached a well-reasoned conclusion in their decision to renew the legislation and authorize preclearance of covered jurisdictions for another twenty-five years.⁹⁹ As a result of *Shelby*, filing a lawsuit under Section 2 of the VRA is the only remaining remedy for combating discriminatory voting practices that are aimed at minority voters.¹⁰⁰

C. Potential Impact of *Shelby County*

As a result of the Supreme Court’s decision in *Shelby County*, federal permission will no longer be required to change voting laws unless Congress creates a new formula that the Court finds to be constitutionally acceptable.¹⁰¹ Several senators

sponsored a new version of the VRA in January, entitled the *Voting Rights Amendment Act of 2014*,¹⁰² which includes a new coverage formula for Section 4, which would therefore reinstate the protections of Section 5.¹⁰³ However, as currently drafted, the Section 4 coverage would not apply to all states, including those “states with an extensive history of voting discrimination like Alabama...Arizona, Florida, North Carolina, South Carolina and Virginia, which were previously subject to Section 5.”¹⁰⁴ This change is due to the new Section 4 coverage formula in the current draft of the bill, a formula that is based on current voting data for geographic areas, and does not take not the area’s historical precedents or previous discriminatory voting practices into account, factors that were considered in the previous formulation of Section 4.¹⁰⁵ Additionally, the proposed amendment does not address voter identification laws.¹⁰⁶ Although the drafting of this bill is better than nothing, it offers substantially fewer protections than the previous VRA offered.¹⁰⁷ Furthermore, there are no guarantees that the bill will be passed, as this Congress is the most sharply politically divided and least effective in terms of passage of laws as any Congress in more than a century.¹⁰⁸

Assuming that Congress does not pass a functional equivalent to Section 4 or even one that is less efficacious, the likely outcome of the repeal of the law and subsequent evisceration of the functionality of Section 5 of the VRA is not hard to foresee—states now have the opportunity to pass potentially discriminatory voting regulations with limited federal oversight. As only Section 2 remains in effect, plaintiffs must present an injury before they can bring a claim, and thus prejudicial laws can no longer be proactively struck down.¹⁰⁹

Sadly, it appears that prejudicial or discriminatory voter identification laws will be passed if the VRA does not return in some form. In the months leading up to the 2012 election, several states attempted to pass voter identification laws that had an overtly discriminatory effect.¹¹⁰ Although several conservative legislators presented voter identification laws under the guise of combating voter fraud, evidence of such fraud was rare.¹¹¹ In 2012, prior to *Shelby County*, Pennsylvania passed a law that required photo identification for voters, Texas attempted to pass a similar law, although it was invalidated following pre-clearance review under

Section 5 of the VRA.¹¹² While the requirement of photo identification might seem fairly innocuous, this requirement has a vastly discriminatory effect on Hispanic voters. In its denial of pre-clearance to the proposed Texas law, the Department of Justice indicated that Hispanic registered voters were anywhere from 46.5 percent to 120 percent more likely to lack photo identification than Caucasian voters.¹¹³ Accordingly, these voter identification laws, if implemented, would effectively disenfranchise large groups of legally registered voters.¹¹⁴

Following the repeal of Section 4 in *Shelby County*, discriminatory laws are already being enacted. For example, North Carolina passed omnibus legislation making voting requirements much more stringent than they were prior to the repeal of Section 4.¹¹⁵ Under these laws, photo identification is required to vote, and same day voter registration is prohibited.¹¹⁶ As mentioned above, laws requiring photo identification disproportionately exclude minority voters, particularly Hispanics.¹¹⁷ In response to this law, the Department of Justice filed a suit in September 2013 challenging the constitutionality of the law and requesting that all future changes to voting laws and polling locations be pre-cleared by the Department of Justice or by a Federal Court, provisions very similar to those that previously existed in the VRA.¹¹⁸ Despite the Department of Justice's constitutional challenge, the future implications of the legislation will not be clear until the North Carolina court rules upon its legality.¹¹⁹

V. Conclusion

Taken as a whole, the confluence of strict felony disenfranchisement laws and the recent repeal of Section 4 of the VRA present a bleak picture for the future of equal voting rights for minorities in our country. Large numbers of citizens, especially African American men, are barred from regaining their voting rights due to previous felony convictions. Even in situations where the former felon has served their full sentence, they are sometimes barred from regaining their right to the franchise due to various debts, related and unrelated to the crime for which they served time. While large numbers of African American men are excluded from the vote due to past felony convictions, African American and Hispanic

minorities are both adversely affected by the repeal of Section 4 of the VRA. Without a formula to determine if discriminatory practices exist, minorities who are discriminated against at the polls must first receive a quantifiable injury (a difficult task) before they can seek a remedy under Section 2 of the VRA, and overtly discriminatory state laws no longer receive federal oversight. Although the right to vote is said to be a fundamental right of citizenship in the United States, gaining equal access to this right is not fundamentally fair.

(Endnotes)

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² 3 ALEXANDER HAMILTON, THE PAPERS OF ALEXANDER HAMILTON 544-545 (Harold C. Syrett ed., Columbia University Press) (1962).

³ See *Shelby Cnty. Ala. v. Holder*, 133 U.S. 2612, 2633 (2013) (Ginsberg, J., dissenting) (detailing examples of laws disenfranchising black voters in southern states in response to the passage of the Fourteenth and Fifteenth Amendments).

⁴ U.S. CONST. art. I, § 4; *id.* amend. XV (ensuring citizens the right to vote regardless of race); *id.* amend. XIX (securing the voting rights of women).

⁵ *Before the Voting Rights Act*, THE UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, www.justice.gov/crt/about/vot/intro/intro_b.php/ (last visited Nov. 10, 2013, 3:56 PM).

⁶ *Id.*

⁷ *Id.*

⁸ *The Voting Rights Act of 1965*, THE UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION (Nov. 10, 2013, 3:56 PM), www.justice.gov/crt/about/vot/intro/intro_b.php/.

⁹ *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

¹⁰ See *Shelby County Ala. v. Holder*, 133 U.S. 2612, 2633 (2013) (Ginsberg, J., dissenting) ("[T]he Voting Rights Act of 1965 . . . has worked to combat voting discrimination where other remedies have tried and failed.").

¹¹ *Id.*

¹² *Id.* at 2629 (majority opinion).

¹³ Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272 (2004).

¹⁴ See *id.* (stating that rate of imprisonment today is five times higher than it was in 1972).

¹⁵ *Id.* at 1274 (stating that in 2002, black men outnumbered white men and Hispanic men in the prison population with sentences exceeding one year).

- 16 George Brooks, *Felon Disenfranchisement: Law, History, Policy and Politics*, 32 FORDHAM URB. L.J. 851, 852-53 (2005).
- 17 *Id.* at 853.
- 18 *Id.* at 856-57.
- 19 *Id.* at 856.
- 20 *Id.* at 857.
- 21 *Id.* at 857.
- 22 *Id.* at 858.
- 23 *Id.* at 858-59.
- 24 *Id.* at 859.
- 25 U.S. CONST. amend. XIII.
- 26 Slaughter-House Cases, 83 U.S. 36, 78 (1873).
- 27 *Id.*
- 28 Brooks, *supra* note 16, at 864.
- 29 Hunter v. Underwood, 471 U.S. 222, 1920 (1985).
- 30 *Id.*
- 31 Brooks, *supra* note 16, at 865.
- 32 Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN. ST. L. REV. 349, 362 (2012) [hereinafter Cammett, *Shadow Citizens*].
- 33 Richardson v. Ramirez, 418 U.S. 24 (1974).
- 34 Cammett, *Shadow Citizens*, *supra* note 32, at 362.
- 35 Richardson, 418 U.S. at 26.
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¹¹⁷ Cohen, *supra* note 110.

¹¹⁸ Josh Gerstein, *Justice Department Challenges North Carolina Voter ID Law*, POLITICO (Sept. 30, 2013), <http://www.politico.com/story/2013/09/justice-department-north-carolina-voter-id-law-97542.html>.

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